

Introduced by Senator Lieu

February 22, 2013

An act to add Section 859.5 to the Penal Code, and to add Section 626.8 to the Welfare and Institutions Code, relating to interrogation.

LEGISLATIVE COUNSEL'S DIGEST

SB 569, as introduced, Lieu. Interrogation: electronic recordation.

Existing law provides that under specified conditions the statements of witnesses, victims, or perpetrators of specified crimes may be recorded and preserved by means of videotape.

This bill would require the electronic recordation of the entire custodial interrogation of a minor who is in a fixed place of detention, as defined, and who, at the time of the interrogation, is suspected of committing or accused of committing a specified offense. The bill would set forth various exceptions from this requirement, including if the law enforcement officer conducting the interrogation or his or her superior reasonably believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being interrogated, or another individual. The bill would require the prosecution to show by clear and convincing evidence that an exception applies to justify the failure to make that electronic recording. The bill would also require the interrogating entity to maintain the original or an exact copy of an electronic recording made of the interrogation until the final conclusion of the proceedings, as specified.

The bill would require the Judicial Council to develop related jury instructions. The bill would also require the Judicial Council to develop forms to survey interrogations and outcomes in order to ensure compliance with these provisions, as specified. The bill would require the Department of Justice to develop forms to be submitted to the

department in each case of an unrecorded interrogation in order to identify patterns of noncompliance. The bill would make these provisions applicable to juvenile court proceedings, as specified. By imposing these new requirements on local law enforcement, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. (a) The Legislature finds and declares the
2 following:
3 (1) According to a national study, false confessions extracted
4 during police questioning of suspects have been identified as the
5 second most frequent cause of a wrongful conviction. Although
6 threats and coercion sometimes lead innocent people to confess,
7 even the most standardized interrogations can result in a false
8 confession or admission. Mentally ill or mentally disabled persons
9 are particularly vulnerable, and some confess to crimes because
10 they want to please authority figures or to protect another person.
11 Additionally, innocent people may come to believe that they will
12 receive a harsher sentence, or even the death penalty, unless they
13 confess to the alleged crime.
14 (2) Three injustices result from false confessions. First, a false
15 confession can result in an innocent person being incarcerated.
16 Second, when an innocent person is incarcerated, the criminal
17 investigations end and the real perpetrator remains free to commit
18 similar or potentially worse crimes. Third, victims' families are
19 subjected to double the trauma: the loss of, or injury occurring to,
20 a loved one and the guilt over the conviction of an innocent person.
21 Mandating electronic recording of custodial interrogations of both
22 adults and juveniles will improve criminal investigation techniques,

1 reduce the likelihood of wrongful convictions, and further the
2 cause of justice in California.

3 (3) Evidence of a defendant's alleged statement or confession
4 is one of the most significant pieces of evidence in any criminal
5 trial. Although confessions and admissions are the most accurate
6 evidence used to solve countless crimes, they can also lead to
7 wrongful convictions. When there is a complete recording of the
8 entire interrogation that produced such a statement or confession,
9 the factfinder can evaluate its precise contents and any alleged
10 coercive influences that may have produced it.

11 (b) For these reasons, it is the intent of the Legislature to require
12 electronic recording of all custodial interrogations of both adults
13 and juveniles. Recording interrogations decreases wrongful
14 convictions based on false confessions and enhances public
15 confidence in the criminal process. Properly recorded interrogations
16 provide the best evidence of the communications that occurred
17 during an interrogation, prevent disputes about how an officer
18 conducted himself or herself or treated a suspect during the course
19 of an interrogation, prevent a defendant from lying about the
20 account of events he or she originally provided to law enforcement,
21 and spare judges and jurors the time necessary and the need to
22 assess which account of an interrogation to believe.

23 SEC. 2. Section 859.5 is added to the Penal Code, to read:

24 859.5. (a) Except as otherwise provided in this section, a
25 custodial interrogation of a minor, who is suspected of committing
26 an offense listed in subdivision (b) of Section 707 of the Welfare
27 and Institutions Code, shall be electronically recorded in its
28 entirety. A statement that is electronically recorded as required
29 pursuant to this section creates a rebuttable presumption that the
30 electronically recorded statement was, in fact, given and was
31 accurately recorded by the prosecution's witnesses, provided that
32 the electronic recording was made of the custodial interrogation
33 in its entirety and the statement is otherwise admissible.

34 (b) The requirement for the electronic recordation of a custodial
35 interrogation pursuant to this section shall not apply under any of
36 the following circumstances:

37 (1) Electronic recording is not feasible because of exigent
38 circumstances. The exigent circumstances shall be recorded in the
39 police report.

1 (2) The person to be interrogated states that he or she will speak
2 to a law enforcement officer only if the interrogation is not
3 electronically recorded. If feasible, that statement shall be
4 electronically recorded. The requirement also does not apply if the
5 person being interrogated indicates during interrogation that he or
6 she will not participate in further interrogation unless electronic
7 recording ceases.

8 (3) The custodial interrogation took place in another jurisdiction
9 and was conducted by law enforcement officers of that jurisdiction
10 in compliance with the law of that jurisdiction, unless the
11 interrogation was conducted with intent to avoid the requirements
12 of this section.

13 (4) The interrogation occurs when no law enforcement officer
14 conducting the interrogation has knowledge of facts and
15 circumstances that would lead an officer to reasonably believe that
16 the individual being interrogated may have committed an offense
17 listed in subdivision (b) of Section 707 of the Welfare and
18 Institutions Code for which this section requires that a custodial
19 interrogation be recorded. If during a custodial interrogation, the
20 individual reveals facts and circumstances giving a law
21 enforcement officer conducting the interrogation reason to believe
22 that an offense listed in subdivision (b) of Section 707 of the
23 Welfare and Institutions Code has been committed, continued
24 custodial interrogation concerning that offense shall be
25 electronically recorded pursuant to this section.

26 (5) A law enforcement officer conducting the interrogation or
27 the officer's superior reasonably believes that electronic recording
28 would disclose the identity of a confidential informant or jeopardize
29 the safety of an officer, the individual being interrogated, or another
30 individual. An explanation of the circumstances shall be recorded
31 in the police report.

32 (6) The failure to create an electronic recording of the entire
33 custodial interrogation was the result of a malfunction of the
34 recording device, despite reasonable maintenance of the equipment,
35 and timely repair or replacement was not feasible.

36 (7) The questions presented to a person by law enforcement
37 personnel and the person's responsive statements were part of a
38 routine processing or booking of that person. Electronic recording
39 is not required for spontaneous statements made in response to

1 questions asked during the routine processing of the arrest of the
2 person.

3 (c) If the prosecution relies on an exception in subdivision (b)
4 to justify a failure to make an electronic recording of a custodial
5 interrogation, the prosecution shall show by clear and convincing
6 evidence that the exception applies.

7 (d) The presumption of inadmissibility of statements provided
8 in this section may be overcome, and a person's statements that
9 were not electronically recorded may be admitted into evidence
10 in a criminal proceeding or in a juvenile court proceeding, as
11 applicable, if the court finds that all of the following apply:

12 (1) The statements are admissible under applicable rules of
13 evidence.

14 (2) The prosecution has proven by clear and convincing evidence
15 that the statements were made voluntarily.

16 (3) Law enforcement personnel made a contemporaneous audio
17 or audio and visual recording of the reason for not making an
18 electronic recording of the statements. This provision does not
19 apply if it was not feasible for law enforcement personnel to make
20 that recording.

21 (4) The prosecution has proven by clear and convincing evidence
22 that one or more of the circumstances described in subdivision (b)
23 existed at the time of the custodial interrogation.

24 (e) Unless the court finds that an exception in subdivision (b)
25 applies, all of the following remedies shall be granted as relief for
26 noncompliance:

27 (1) Failure to comply with any of the requirements of this section
28 shall be considered by the court in adjudicating motions to suppress
29 a statement of a defendant made during or after a custodial
30 interrogation.

31 (2) Failure to comply with any of the requirements of this section
32 shall be admissible in support of claims that a defendant's statement
33 was involuntary or is unreliable, provided the evidence is otherwise
34 admissible.

35 (3) If the court admits into evidence a statement made during a
36 custodial interrogation that was not electronically recorded in
37 compliance with this section, the court, upon request of the
38 defendant, shall give to the jury cautionary instructions. The
39 Judicial Council shall develop jury instructions that are
40 substantially similar to the following jury instruction:

1
2 “The law requires the electronic recording of interrogations by
3 law enforcement officers when a defendant is charged with an
4 offense listed in subdivision (b) of Section 707 of the Welfare and
5 Institutions Code. This is done to ensure that you will have before
6 you a complete picture of the circumstances under which an alleged
7 statement of a defendant was made in a custodial setting so that
8 you may determine whether a statement was, in fact, made in that
9 custodial setting and accurately recorded. If there is a failure to
10 electronically record an interrogation, you have not been provided
11 with a complete picture of all the facts surrounding the defendant’s
12 alleged statement and the precise details of that statement. By way
13 of example, you cannot hear the tone or inflection of the
14 defendant’s and interrogator’s voice, or hear first hand the
15 interrogation, both questions and responses, in its entirety. Instead
16 you have been presented with a summary based upon the
17 recollections of law enforcement personnel. Therefore, you should
18 weigh the evidence of the defendant’s alleged statement made in
19 a custodial setting with great caution and care as you determine
20 whether the statement was, in fact, made in that custodial setting,
21 and, if so, whether it was accurately reported by the state’s
22 witnesses, and what, if any, weight it should be given in your
23 deliberations.

24 You have heard evidence that the defendant made a statement
25 to a law enforcement officer in a custodial setting and that the
26 statement was not recorded. You are the exclusive judge as to
27 whether the defendant made the statement in that custodial setting,
28 and as to what was actually said.

29 You must first decide whether the defendant, in fact, made that
30 statement in a custodial setting, in whole or in part. Among the
31 factors you may consider in deciding whether the defendant
32 actually made the alleged statement in a custodial setting is the
33 failure of law enforcement officials to make an electronic recording
34 of the interrogation conducted and the alleged statement itself. The
35 fact that a law enforcement officer did not comply with the law
36 requiring the electronic recording of the reported statement shall
37 be considered by you as a circumstance tending to show that the
38 statement was not made in that custodial setting.

39 If you find that the defendant did make the statement in that
40 custodial setting, you must view the statement, as reported, with

1 caution, because unrecorded oral statements made by a defendant
2 out of court to a law enforcement officer should be viewed with
3 caution. The failure of the law enforcement officer to comply with
4 the law requiring recording of the reported statement shall also be
5 considered by you as a circumstance bearing on the weight and
6 credibility to be given to the officer's account of the statement.

7 The presence of an electronic recording that is recorded in its
8 entirety permits, but does not compel you to conclude that the
9 prosecution has proven that a statement was, in fact, given and
10 that the electronically recorded statement was accurately reported
11 by the prosecution's witnesses."
12

13 (f) The interrogating entity shall maintain the original or an
14 exact copy of an electronic recording made of a custodial
15 interrogation until a conviction for any offense relating to the
16 interrogation is final and all direct and habeas corpus appeals are
17 exhausted or the prosecution for that offense is barred by law or,
18 in a juvenile court proceeding, as otherwise provided in subdivision
19 (b) of Section 626.8 of the Welfare and Institutions Code. The
20 interrogating entity may make one or more true, accurate, and
21 complete copies of the electronic recording in a different format.

22 (g) (1) Compliance with the electronic recording requirement
23 shall be monitored by the Judicial Council. The Judicial Council
24 shall develop forms to survey interrogations and outcomes and to
25 identify any patterns of noncompliance with the requirements of
26 this section. These forms shall be completed and submitted by the
27 judge and the prosecutor to the Judicial Council for any of the
28 following cases:

29 (A) Cases in which recorded interrogations were introduced as
30 evidence in a criminal proceeding.

31 (B) Cases in which interrogations were not recorded, but were
32 nonetheless introduced as evidence in a criminal proceeding.

33 (C) Cases in which interrogations were recorded and a plea of
34 guilty to a felony offense was entered and accepted by the court.

35 (D) Cases in which interrogations were not recorded and a plea
36 of guilty to a felony offense was entered and accepted by the court.

37 (2) Compliance with the electronic recording requirement shall
38 also be monitored by the Department of Justice. The Department
39 of Justice shall develop forms for purposes of identifying any
40 patterns of noncompliance. The forms shall describe the charges

1 against the person, the location where the interrogation took place,
2 and the exception listed in subdivision (b) that was the primary
3 basis for the failure to record the interrogation. These forms shall
4 be completed and submitted to the department by the interrogating
5 officer or officers in each case of an unrecorded interrogation,
6 regardless of whether the electronic recording is presumed
7 inadmissible into evidence under this section, or is in fact
8 inadmissible under this section.

9 (h) For the purposes of this section, the following terms have
10 the following meanings:

11 (1) “Custodial interrogation” means any interrogation in a fixed
12 place of detention involving a law enforcement officer’s
13 questioning that is reasonably likely to elicit incriminating
14 responses, and in which a reasonable person in the subject’s
15 position would consider himself or herself to be in custody,
16 beginning when a person should have been advised of his or her
17 constitutional rights, including the right to remain silent, the right
18 to have counsel present during any interrogation, and the right to
19 have counsel appointed if the person is unable to afford counsel,
20 and ending when the questioning has completely finished.

21 (2) “Electronic recording” means an audio or video recording
22 that accurately records a custodial interrogation.

23 (3) “Fixed place of detention” means a fixed location under the
24 control of a law enforcement agency where an individual is held
25 in detention in connection with a criminal offense that has been,
26 or may be, filed against that person, including a jail, police or
27 sheriff’s station, holding cell, correctional or detention facility,
28 juvenile hall, or a facility of the Division of Juvenile Facilities.

29 (4) “Law enforcement officer” means a person employed by a
30 law enforcement agency whose duties include enforcing criminal
31 laws or investigating criminal activity, or any other person who is
32 acting at the request or direction of that person.

33 SEC. 3. Section 626.8 is added to the Welfare and Institutions
34 Code, to read:

35 626.8. (a) Subdivisions (a) to (d), inclusive, paragraphs (1)
36 and (2) of subdivision (e), and subdivisions (g) and (h) of Section
37 859.5 of the Penal Code shall apply to any custodial interrogation
38 of a person who is or who may be adjudged a ward of the juvenile
39 court pursuant to Section 602 related to an offense described in
40 subdivision (b) of Section 707.

1 (b) (1) Except as otherwise provided in paragraph (2), Article
2 22 (commencing with Section 825) shall apply to any electronic
3 recording or other record made pursuant to this section.

4 (2) The interrogating entity shall maintain an original or exact
5 copy of any electronic recording made of a custodial interrogation
6 until the person is no longer subject to the jurisdiction of the
7 juvenile court, unless the person is transferred to a court of criminal
8 jurisdiction. If the person is transferred to a court of criminal
9 jurisdiction, subdivision (f) of Section 859.5 of the Penal Code
10 shall apply. The interrogating entity may make one or more true,
11 accurate, and complete copies of the electronic recording in a
12 different format.

13 SEC. 4. If the Commission on State Mandates determines that
14 this act contains costs mandated by the state, reimbursement to
15 local agencies and school districts for those costs shall be made
16 pursuant to Part 7 (commencing with Section 17500) of Division
17 4 of Title 2 of the Government Code.